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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1992

DORSIE LEE JOHNSON,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the special issues submitted at the punishment phase permitted the jury to give mitigating effect to the fact that Johnson was nineteen years old at the time of the offense.

2. Whether the trial court properly denied Johnson's challenge for cause to Susan Kiker, because her views would not have prevented or substantially impaired her performance as a juror in Johnson's case.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent,[1] and files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas affirming Johnson's conviction and sentence is published at 773 S.W.2d 322 (Tex. Crim. App. 1989); the court denied Johnson's motion for rehearing in an unpublished opinion delivered on May 27, 1992. A copy of the published opinion is attached to the petition as Appendix A, and a copy of the unpublished opinion on denial of rehearing is attached to the petition as Appendix B.

[1] For clarity, Respondent will be referred to as "the state" and Petitioner Dorsie Lee Johnson as "Johnson".

JURISDICTION

Johnson seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Johnson bases his claims on the sixth, eighth, and fourteenth amendments to the United States Constitution. Also implicated is the Texas capital sentencing statute in effect at the time of Johnson's trial, TEX. CODE CRIM. PROC. ANN. art. 37.071(b), (e) (Vernon 1981).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

By an indictment filed in the 132nd Judicial District Court of Scurry County, Texas, Cause No. 5575, Johnson was charged with the capital offense of intentional murder of Jack Huddleston during the course of a robbery (Tr. 2). He entered a plea of not guilty and was tried before a jury. On November 12, 1986, the jury found Johnson guilty of capital murder (Tr. 114). A separate sentencing hearing ensued, and on November 14, 1986, the jury returned affirmative answers to the two special issues submitted pursuant to TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Tr. 119-20). In accordance with Texas law, the trial court assessed Johnson's punishment at death by lethal injection (Tr. 122).

Johnson directly appealed to the Court of Criminal Appeals of Texas, which affirmed the conviction and sentence in an opinion delivered on June 21, 1991. *Johnson v. State*, 773 S.W.2d 322 (Tex. Crim. App. 1991). In an unpublished opinion, the state appellate court on May 27, 1992, denied Johnson's motion for rehearing.

B. Statement of Facts

The facts pertaining to Johnson's commission of the capital murder are adequately set out in the opinion of the Court of Criminal Appeals.

> In the early morning hours of Sunday, March 23, 1986, [Johnson] and his accomplice, Amanda Miles, decided to commit a robbery at the Allsup's convenience store in Snyder. After planning the crime, deciding that there should be no witnesses, and waiting for the store to clear of customers, the pair entered the store. On the pretext of wanting a particular item, [Johnson] lured Huddleston, the clerk, back to the cooler where he was told this was a robbery and to lie face down on the floor. [Johnson] then shot the clerk in the back of the neck with a .25 caliber pistol, killing him. Amanda Miles emptied out the cash drawer taking approximately $160.00 (one hundred sixty dollars). Two cartons of cigarettes were also taken.
>
> [Johnson] was arrested in April for a subsequent robbery and attempted murder of a store clerk in the neighboring town of Colorado City. It was in the course of investigating this latter offense that [Johnson] confessed to the capital offense committed in Snyder.

Johnson v. State, 773 S.W.2d at 324.

The facts pertaining to Johnson's challenge for cause of juror Susan Kiker are as follows. When questioned by the prosecutor during individual jury selection, Kiker stated that a life sentence might be appropriate in a capital case, depending upon the facts adduced (SR X 4065-66), and that she would not automatically answer the special issues affirmatively in the event Johnson were convicted of capital murder (SR X 4072). Subsequently, the following colloquy occurred between Kiker and defense counsel:

> Q: Okay. Do you think a person who is in their teenage years by their actions during their teenage years absolutely predicts the way they are going to be twenty or thirty or forty years from now -- from then, rather?
>
> A: Most of the time, yes. I know that as I was a teenager, I'm pretty much the same as an adult.

Q: Is that something -- is that opinion you have based strictly on you individually? You think that is something that you have learned from your own ---

A: Or have seen others.

Q: That you have formed an opinion through psychology or sociology courses?

A: No, I didn't get that opinion through my sociology or psychology courses, I don't think. Yes, people can change. What they have been like as a young adult does not necessarily mean that that's the way they'll be in their older adult years. But, like I said, most -- in my opinion most of the time they are.

Q: So as to that question if you heard evidence of other criminal acts, you would -- are you saying that you just would automatically vote yes?

A: No, sir. No, that's not what I said.

Q: Okay. I don't mean to -- I would rather ask you what you mean and let you tell me.

A: Right. No, that's not what I meant. Like I said, anyone can change. As I said before, if it's a first time offense, even if it's capital murder, that doesn't necessarily mean they'll ever do it again.

Q: Okay. Well, if in a case you heard evidence of other individual bad acts, the same type of crime, would you say a person could change?

A: You're asking me if he's -- if this person has committed bad acts all through his life, if he can change?

Q: Well, again, you know, if you have a young person and if you heard -- if you had already found him guilty of one crime and you heard evidence of other similar crimes ---

A: You know, a younger person -- just because he's a younger person, say fifteen or nineteen or twenty, doesn't necessarily mean his maturity is all that young

or that old. And, you know, a younger person may have the mind of a very mature adult. So I can't say that just because he was young and in his younger years he might not ever commit another crime because I know a lot of forty year old men that are still very young.

Q: You would agree that ---

A: Very young.

Q: Yes, ma'am. You would agree that he could also ---

MR. ARMSTRONG: He is talking about you.

Q: (By Mr. Conrad) Have a very immature mind ---

A: Yes.

Q: --- for whatever age, nineteen, eighteen, that they might have the maturity of a twelve year old, for instance?

A: That's right.

Q: Do you think that type person should be treated the same as the person who was nineteen years old and had the maturity of a twenty-five year old? Talking about a person who, say, was nineteen years old and had the maturity level of a twelve year old?

A: Should be treated the same? In what instance? This instance right now?

Q: In the punishment phase?

A: A punishment type situation, yes, I do. I think so. I think they should be treated the same.

(SR X 4084-87). Defense counsel challenged for cause on the basis that "the Juror testified that she could not -- did not consider -- could not consider age, basically, as a mitigating factor in deciding punishment; that, basically, all ages, either mental age or physical age, should be dealt with the same punishment." The trial

court initially indicated that this was not a proper basis for exclusion. However, when defense counsel further argued that youth was a mitigating factor upon which the defense is entitled to rely, see TEX. CODE CRIM. PROC. ANN. art. 35.16(c)(2), the trial court ruled that Kiker was not disqualified from jury service (SR X 4105).

SUMMARY OF ARGUMENT

Johnson advances no special or important reasons that warrant the Court's exercise of its certiorari jurisdiction. Johnson's claim under *Penry v. Lynaugh*, 492 U.S. 302 (1989), is without merit. The two statutory special issues submitted to Johnson's jury provided it with the requisite fair vehicle for giving mitigating effect to evidence that Johnson was nineteen years old when he committed the capital murder.

Johnson's claim that venire members Barbee and Lammert should have been excluded for cause is not properly before the Court for review on writ of certiorari. Those arguments were first presented to the highest state court in a motion for rehearing, and the state court neither entertained nor decided the claim. To the extent Johnson contends that the trial court erred in overruling his challenge for cause of Susan Kiker, the claim is unmeritorious. The record reflects that Kiker's views would not have prevented or substantially impaired her performance as a juror in Johnson's cause, and, consequently, Johnson was not entitled to exclude her from service.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THE COURT'S ATTENTION.

Rule 10.1 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Johnson has advanced no special or important reason for the Court to exercise its certiorari jurisdiction in this case, and none exists.

II.

JOHNSON HAS NO VIABLE CLAIM UNDER *PENRY* BECAUSE HIS MITIGATION EVIDENCE, AS PRESENTED AT TRIAL, WAS RELEVANT TO THE SPECIAL ISSUES AND DID NOT REFLECT A REDUCED CULPABILITY BEYOND THE SCOPE OF THOSE ISSUES.

Relying on *Penry v. Lynaugh*, 492 U.S. 302 (1989), Johnson contends that the Texas capital sentencing statute was unconstitutionally applied in his case because the special issues[2] did not allow the jury to give mitigating effect to his

---

[2] At the time of Johnson's trial, the sentence in a Texas capital murder trial was based upon the jury's answers to the following questions:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

relative youth of nineteen years at the time he committed the capital murder. The court below applied this Court's eighth amendment precedent to Johnson's claim under *Penry* and correctly denied relief. Johnson's mitigating evidence, as proffered at trial, was relevant to the special issues and had no relevance to his culpability beyond the scope of those issues. Under these circumstances, no supplemental mitigation instruction was constitutionally required.

Under the Texas capital sentencing scheme, the jury can give mitigating effect to any evidence that, if credited and given sufficient weight by the jury, rationally can raise a reasonable doubt on a punishment issue. In *Jurek v. Texas*, 428 U.S. 262 (1976), the Court upheld the constitutionality of the Texas death penalty scheme because, among other things, a defendant is free to ask the jury to consider, in responding to the second of two or three statutory special issues, whatever evidence of mitigating circumstances the defense can bring before it. In

> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

TEX. CODE CRIM. PROC. ANN. art. 37.071(b). The first two issues were submitted to the jury at the punishment phase of Johnson's trial (Tr. 119-20). In addition, the trial court gave the following instruction:

> In determining each of these Issues, you may take into consideration all the evidence submitted to you in the trial of this case, whether aggravating or mitigating in nature, that is, all the evidence in the first part of the trial when you were called upon to determine the guilt or innocence of the Defendant and all the evidence, if any, in the second part of the trial wherein you are called upon to determine the answers to the Special Issues.

(Tr. 117-18).

Penry, however, the Court held that if a capital defendant introduces evidence about his background, character, or the circumstances of the offense that reflects a reduced culpability, and the jury cannot give effect to the mitigating force of that evidence in responding to the special issues, the trial court must upon request provide instructions that allow the jury to give mitigating effect to the evidence. *Id.* at 320-21, citing *Franklin v. Lynaugh*, 487 U.S. 164, 185 (1988) (O'Connor, J., concurring). Following *Franklin* and *Penry*, the Texas statute maintains its facial validity, as the Court made clear that supplemental instructions are not constitutionally indispensable in every case. Accord *Graham v. Collins*, 950 F.2d 1009, 1027 (5th Cir. 1992) (en banc).

A capital defendant is entitled only to an individualized sentencing decision that is a reasoned moral response to the evidence, including mitigating evidence. The body of this Court's eighth amendment jurisprudence demonstrates that traditional and long-standing policies--society's very justifications for punishing criminals--rationalize capital sentencing and render the jury's response a reasoned and moral one. For example, in *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978), the Court relied heavily on *Williams v. New York*, 337 U.S. 241 (1949), to hold that the policy considerations that led to a prevailing practice of individualized sentencing in non-capital cases attain sufficient weight in capital cases that individualized sentencing is constitutionally indispensable. In capital cases, as in the non-capital context, individualized sentencing serves society's interests in punishing the individual for his misdeeds (retribution), preventing similar future conduct by the person convicted and others (deterrence),[3] and restoring the convict

[3] Although general deterrence is a penological justification, the Supreme Court in *Gregg v. Georgia*, 428 U.S. at 186 (opinion of Stewart, J., joined by Powell and Stevens, JJ.), noted that "[t]he value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures."

to a useful and productive place in society (rehabilitation). See *Gregg v. Georgia,* 428 U.S. 153, 183-87 (1976) (opinion of Stewart, J., joined by Powell and Stevens, JJ.). More recently, the Court reaffirmed that the Constitution does not require that the sentencer be permitted to dispense mercy based on sympathy for the defendant, even if that sympathy is a response to the mitigating evidence. "It is no doubt constitutionally permissible, if not constitutionally required, for the State to insist that the 'individualized assessment of the appropriateness of the death penalty be a moral inquiry into the culpability of the defendant and not an emotional response to the mitigating evidence.'" *Saffle v. Parks,* 494 U.S. 484, 492-93 (1990), quoting *California v. Brown,* 479 U.S. 538, 545 (1987).

Two specific sentencing considerations, a capital defendant's personal culpability and his future dangerousness, have evolved from and reflect these traditional sentencing concerns in the capital context. The absence of future dangerousness is constitutionally relevant because it relates to the traditional sentencing consideration of rehabilitation. "Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of capital sentencing. . . ." *Skipper v. South Carolina,* 476 U.S. 1, 5 (1986); see also *Barefoot v. Estelle,* 463 U.S. 880, 897 (1983); *California v. Ramos,* 463 U.S. 992, 1002-03 (1983).

Likewise, the sentencer must be permitted to consider the defendant's culpability precisely because society's interest in exacting retribution for criminal conduct is, in part, a function of his level of culpability for engaging in that conduct. *Tison v. Arizona,* 481 U.S. 137, 149 (1987) (heart of the retribution rationale is that sentence be directly related to the culpability of the defendant). Accordingly, in order for aspects of the defendant's background to reflect a reduced culpability, the capital murder must be to some degree attributable to them.

> [E]vidence about the defendant's background and character is relevant *because of the belief, long held by this society,* that defendants who commit criminal acts that are *attributable* to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. . . . Thus, the sentence imposed at the penalty phase should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion.

California v. Brown, 479 U.S. at 545 (O'Connor, J., concurring) (first and second emphases added, third emphasis in original); *Penry v. Lynaugh,* 492 U.S. at 319. Absent a nexus, the evidence does not reflect that the defendant is less culpable, or responsible for his conduct, than any other person, and concomitantly, the sentencer's response to such evidence cannot be a reasoned and moral response to the defendant's culpability.

While cases such as *Lockett* govern the factors the jury must be permitted to consider in making its sentencing decision, the Court never has promulgated "rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Saffle v. Parks,* 494 U.S. at 490. "States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Boyde v. California,* 494 U.S. at 377, quoting *Franklin v. Lynaugh,* 487 U.S. at 181 (plurality opinion). Thus, while a defendant is entitled to proffer any aspect of his background, character, or offense in mitigation of a death sentence, the eighth amendment is violated only if evidence that is probative of a reduced culpability or capacity for rehabilitation cannot result in a sentence less than death.

Finally, a reviewing court should not set aside a death sentence unless there is a "reasonable probability" that the jury would have interpreted instructions to preclude effective consideration of the mitigating force of the defendant's

evidence, as that evidence actually was presented at trial. *Boyde v. California*, 494 U.S. 370, 380-84 & n.5 (1990). The Court has made clear that the Constitution does not require that the sentencer be permitted to give effect to the defendant's evidence in whatever manner or to whatever extent the defendant desires. Rather, the defendant is entitled only to *a* fair vehicle by which the sentencer can give effect to the mitigating force of his evidence. *Id.*;[4] *Saffle v. Parks*, 494 U.S. at 491-92; accord *Graham v. Collins*, 950 F.2d at 1027, 1031 n.27.

The court below correctly applied this Court's eighth amendment precedent to Johnson's claim under *Penry*. Johnson's mitigating evidence, as actually proffered at trial, was relevant to the special issues and had no relevance to his culpability beyond the scope of those issues. Under these circumstances, as in *Franklin v. Lynaugh*, no supplemental mitigation instruction was constitutionally required.

In light of the *Jurek* Court's direct reference to the Court of Criminal Appeals' statement[5] that the jury could consider the age of the defendant is

[4] For example, in *Boyde*, the defendant urged that evidence he won a dance contest in prison demonstrated an absence of future dangerousness--a factor that Boyde argued could not be given effect under California's death penalty statute. As a threshold matter, the Court refused to consider Boyde's future dangerousness argument, because he did not proffer the evidence for that purpose at the time of trial. *Boyde v. California*, 494 U.S. at 382 n.5. Rather, Boyde presented the evidence as an aspect of his good character, and the Court held that the jury could give effect to such evidence insofar as it demonstrated the crime to be an aberration from an otherwise good character. *Id.* Despite the fact that the jury did not have what was arguably the most direct vehicle for giving mitigating effect to Boyde's evidence--a future dangerousness factor--and despite the fact that the jury could not have given independent mitigating effect to this evidence if it also believed that Boyde's crime was not an aberration, the Court found no eighth amendment violation because the jury had *a* fair vehicle for giving effect to that evidence.

[5] *Jurek v. State*, 522 S.W.2d 934 (Tex. Crim. App. 1975).

answering the second issue and Jurek's relative youth at the time of the offense (twenty-two), *Jurek* necessarily stands for the proposition that a defendant's youth is adequately encompassed by the second issue's inquiry. "Limitations attributable to youth are all necessarily transitory. . . . Therefore, whatever is mitigating about youth tends to lend support to a 'no' answer to the second special issue, and its tendency to do so is essentially proportional to the degree to which the jury concludes that such factors were influential in the defendant's criminal conduct." *Graham v. Collins*, 950 S.W.2d at 1031. "To the extent that [a defendant's] criminal conduct was a product of his youth he was for that reason not only less culpable but, to the same extent, also less likely to be dangerous when no longer young." *Id.*; see also *Cordova v. Collins*, 953 F.2d 167, 170 n.2 (5th Cir.) (a transitory condition at the time of the offense may be adequately taken into account in answering the second special issue, and the exception created by *Penry* to the adequacy of the statutory issues is limited to those atypical circumstances in which a defendant experiences a uniquely severe handicap with which he is burdened through no fault of his own), *cert. denied & stay denied*, ___ U.S. ___, 112 S. Ct. 959 (1992).

Indeed, the jury could give mitigating effect to Johnson's age of nineteen years in precisely the manner urged by defense counsel. Counsel argued that the jury should consider Johnson's age as mitigating against an affirmative answer to the deliberateness issue--"did he have full realization of what he was doing and what the effect would be of what he was doing?" (SR XV 434). Counsel focused on the future dangerousness issue, emphasizing testimony that young people frequently change as they mature and outgrow youthful rebelliousness (SR XV 441-42). Counsel's overall theory respecting both issues was to portray Johnson as a young person, lured into the use of drugs by a bad crowd, who acted uncharacteristically and without reflection when he committed the offense.

Because Johnson's jury had a fair vehicle by which to give mitigating effect to his background and character evidence, his sentence comports with the requirements of the eighth and fourteenth amendments.

III.

TO THE EXTENT JOHNSON'S CLAIM OF IMPROPER DENIAL OF DEFENSE CHALLENGES FOR CAUSE IS PROPERLY BEFORE THE COURT, IT IS WITHOUT MERIT.

A. Johnson's claim that venire members Barbee and Lammert should have been excluded for cause is not properly before the Court because it was neither properly presented nor decided by the state court below.

Johnson next contends that his sixth, eighth, and fourteenth amendment rights were infringed when the trial court denied his challenges for cause to jurors Barbee, Kiker, and Lammert. As Johnson's claim pertains to Barbee and Lammert, it is not properly before the Court. Johnson first attempted to raise these assertions in a motion for rehearing filed in the Court of Criminal Appeals. Although the state appellate court granted rehearing to address Johnson's claim under *Penry v. Lynaugh*, it denied rehearing on his claim that the trial court erred in failing to excuse for cause prospective jurors Barbee and Lammert.

The cases are both legion and long-standing that the Court will not decide issues raised for the first time on petition for certiorari or appeal and that the Court will not decide federal questions not raised properly and decided in the court below. *E.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-22 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 410 U.S. 797, 805-06 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). To properly invoke the Court's jurisdiction, it is crucial that the federal question not only be raised in the prior proceedings, but that it be raised at

the proper point. *Beck v. Washington*, 369 U.S. 541, 550 (1962); *Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919). "[W]hen 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'" *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 550 (1987), quoting *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) (further citations omitted).

Moreover, raising a federal question for the first time in a motion for rehearing addressed to the highest state court is insufficient to invoke Supreme Court jurisdiction unless the court below actually entertains and expressly decides the question. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); see also *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932); *Forbes v. State Council*, 216 U.S. 396 (1910); *Simmerman v. Nebraska*, 116 U.S. 54 (1885). To merit Supreme Court review, the order denying the petition must be more than a cursory recitation that the petition has been considered and denied; rather, there must be language in the order that in some way reflects that the state court "exerted its jurisdiction in such a way that the cases could have been brought here had the questions been raised prior to the original disposition." *Radio Station WOW*, 326 U.S. at 128; *Hathorn v. Lovorn*, 457 U.S. 255, 265 n.15 (1982).

Johnson has not attempted to demonstrate that his claim was properly presented to the Court of Criminal Appeals or that the state court actually passed upon it. To the contrary, Johnson concedes that the issue was raised for the first time on motion for rehearing and that the Court of Criminal Appeals declined to consider the issue. Petition at 6. In Texas, the general rule is that a defendant may seek rehearing only of issues that were presented prior to the appellate court's disposition of the case, unless the appellate court finds that the ends of justice

require consideration of a new claim. *E.g., Rochelle v. State*, 791 S.W.2d 121, 124-25 (Tex. Crim. App. 1985). The Court of Criminal Appeals adhered to the general rule when it denied rehearing instead of affirmatively entertaining the belatedly injected claim. Consequently, the issue is not properly before the Court for review on writ of certiorari.

B. Juror Kiker's views did not disqualify her from service on the jury because they would not have prevented or substantially impaired her performance as a juror in accordance with her instructions and her oath.

The only question that is properly before the Court is whether the trial court erred in overruling Johnson's challenge for cause of Susan Kiker. Johnson challenged Kiker for cause under TEX. CODE CRIM. PROC. ANN. art. 35.16(c)(2) (Vernon Supp. 1991), on the basis that she could not follow a phase of the law upon which the defense was entitled to rely--consideration of youth as a mitigating factor at the punishment phase (SR X 4085-87). Although during *voir dire*, Kiker stated that a nineteen-year-old defendant with the maturity of a twenty-five year old and a nineteen-year-old with the maturity of a twelve year old should generally be treated the same as to punishment (SR X 4087), this view did not disqualify Kiker from jury service because it would not have prevented or substantially impaired her performance as a juror in Johnson's case.

It is well established that "the State may exclude from capital sentencing that 'class' of veniremen whose views would prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths." *Wainwright v. Witt*, 469 U.S. 412, 424 n.5 (1985). More recently, in *Morgan v. Illinois*, ___ U.S. ___, 112 S. Ct. 2222 (1992), the Court expressly recognized a corresponding right of capital defendants to exclude prospective jurors on the same basis. Just as the state may challenge a venire member who would in every case

vote against the death penalty, the defendant is entitled to exclude "[a] juror who will automatically vote for the death penalty in every case. . . ." *Id.* at ___, 112 S. Ct. at 2229. Translating *Morgan* to the context of Texas' capital sentencing statute, a juror "must be willing not only to accept that in certain circumstances death is [not] an acceptable penalty but also to answer the statutory questions without conscious distortion or bias." *Adams v. Texas*, 448 U.S. 38, 47 (1980).

The record reflects that Kiker was not subject to exclusion under *Morgan* and *Adams*. Kiker's general philosophy regarding criminal punishment, like a juror's mere philosophical disagreement with capital punishment, provided no basis for a challenge for cause. Kiker did not say that she felt age should not be a mitigating factor at punishment, and she was not asked such a question. However, when questioned by defense counsel regarding the second special issue,[6] Kiker's answers demonstrated her ability to consider youth as a mitigating factor and give effect to that factor during sentencing deliberations. Kiker recognized that a person's behavior as a young adult was not necessarily indicative of his future behavior. Moreover, Kiker unequivocally maintained that she would not automatically vote "yes" on the future dangerousness question even if it were shown that the defendant had committed violent acts in addition to a capital murder. Because Kiker could "apply the law [and] view the facts impartially", the trial court did not err in overruling Johnson's challenge for cause.

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[6] Kiker was not questioned regarding her ability to consider and give mitigating effect to evidence of youth in responding to the first special issue.

CONCLUSION

For the forgoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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October 13, 1992

The Honorable William K. Suter
Clerk, United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

Re: *Dorsie Lee Johnson v. The State of Texas*, No. 92-5653

Dear Mr. Suter:

Enclosed for filing with the papers in the above styled cause are the original and nine copies of Respondent's Brief in Opposition. Also enclosed is the Proof of Service Form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the post-paid envelope provided.

By copy of this letter, I am forwarding a copy of said brief to counsel for Petitioner.

Thank you for your kind assistance in this matter.

Yours truly,

DANA E. PARKER
Assistant Attorney General
(512) 463-2080

DEP/kh
Enclosures
c: Scott W. Braden
1600 Cross Center Drive
Norman, Oklahoma 73019

No. 92-5653

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1992

DORSIE LEE JOHNSON,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Court of Criminal Appeals of Texas

PROOF OF SERVICE

I hereby certify that on the 13th day of October, 1992, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Scott W. Braden, 1660 Cross Center Drive, Norman, Oklahoma 73019. All parties required to be served have been served. I am a member of the Bar of this Court.

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